

Institutionalist and methodological perspectives on law: contributions of the Economics of Convention

Diaz-Bone, Rainer

Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:
GESIS - Leibniz-Institut für Sozialwissenschaften

Empfohlene Zitierung / Suggested Citation:

Diaz-Bone, R. (2015). Institutional and methodological perspectives on law: contributions of the Economics of Convention. *Historical Social Research*, 40(1), 23-41. <https://doi.org/10.12759/hsr.40.2015.1.23-41>

Nutzungsbedingungen:

Dieser Text wird unter einer CC BY Lizenz (Namensnennung) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier:
<https://creativecommons.org/licenses/by/4.0/deed.de>

Terms of use:

This document is made available under a CC BY Licence (Attribution). For more Information see:
<https://creativecommons.org/licenses/by/4.0>

Institutionalist and Methodological Perspectives on Law – Contributions of the Economics of Convention

Rainer Diaz-Bone*

Abstract: »Institutionalistische und methodologische Perspektiven auf Recht – Beiträge der economics of convention«. The article presents in its first parts main concepts of the French approach of economics of convention (EC) and its main contributions to the analysis of (economic) law. EC represents an endogenous perspective of law as an institution whose usage is embedded in situations wherein competent actors have to coordinate and develop a shared understanding of situations. EC conceives real situations as structured by coordinating actors and a plurality of logics of coordination, which are called conventions in this approach. EC has contributed in some of its historical research studies on economic institutions to the analysis of (economic) law. In the second part of this article, newer trends in EC are discussed which focus on discursive practices and apply strategies of discourse analysis in the analysis of economic institutions as labor law. It is claimed that EC can be regarded as a distinguished approach for the integration of discourse analytic perspectives into a complex pragmatic approach to political economy.

Keywords: Economics of conventions, investment in forms, discourse, institutionalism, collective cognitive dispositives, legal production, law, labor law, economic law.

1. Introduction¹

The French approach of the so-called “*économie des conventions*” (economics of convention, in short EC) has developed in the last three decades in the Paris region and nowadays represents one of the most important French contributions to the analysis of political economy.² From its beginnings, it has included a

* Rainer Diaz-Bone, Department of Sociology, University of Lucerne, Frohburgstrasse 3, 6002 Lucerne, Switzerland; rainer.diazbone@unilu.ch.

¹ I would like to thank Robert Salais and Claude Didry for discussion and comments.

² The main monographs are Boltanski and Thévenot (2006) and Storper and Salais (1997). Important French collections are Salais and Thévenot (1986), Salais, Chatel and Rivaut-Danset (1998), Orléan (2004), Eymard-Duvernay (2006a, 2006b). English written collections are Favereau and Lazega (2002), Salais and Diaz-Bone (2011, 2012). German written collec-

pragmatist and historical perspective in the analysis of institutions and conventions. EC avoided separating the analysis of economies, organizations, markets and law, as many other approaches did. Today, EC is also one of the few international exceptions for an integrating approach of the analysis of economy, its institutions and law.³ Another one is the Chicagoan “Law and economics” approach.⁴ From its beginning, EC also applied a complex pragmatic situationalism as its methodological position, focusing on competent actors who have to coordinate in situations pursuing a collective goal and collective goods.

Actors implicitly and – in case of conflict or reflexive communication – explicitly refer to conventions as logic of coordination (Boltanski and Thévenot 2006). The notion of convention as elaborated by the EC approach therefore does not mean “standards” or “customs” (Diaz-Bone and Thévenot 2010). Instead, conventions are conceived as cultural frames of evaluation and coordination actors refer to when they have to build up shared framings of situations, events and objects. Conventions are the foundations for shared evaluations of quality and worth (in French *grandeur*). In real situations and in real institutional settings EC assumes a pluralism of co-existing conventions actors can refer to (Storper and Salais 1997). Sometimes this pluralism provokes conflict, but in most everyday situations, actors have worked out compromises of these different conventions and these compromises are stabilized by their links to cognitive formats and objects (Thévenot 1984, 2006).⁵

In this article, the genuine contributions of EC to the political economy of law are introduced. Thereby its specific methodological position – which could be labelled as complex pragmatic situationalism (Diaz-Bone 2011) – and its set of main concepts are engaged in the interpretation of law as an important institution for economic coordination. But this contribution will also argue that there are some developments within EC which prepare the inclusion of language and discourse analyses into this approach. Especially the concept of law production (Didry 2002, 2012) can be interpreted as a sphere where discursive practices are important for the development, implementation and interpretation of law.

tions are Diaz-Bone and Thévenot (2010), Diaz-Bone (2011). Shorter German introductions were published by Salais (2007) and Diaz-Bone (2009a, 2009b).

³ Many representatives cooperated with French law scientists, as Antoine Lyon-Caen or Alain Supiot. See for example the report edited by Lyon-Caen and Affichard which is the result of one of these cooperations (Lyon-Caen and Affichard 2008).

⁴ See the introduction of this volume for an evaluation of the Law and Economics-approach from the perspective of EC.

⁵ And – it has to be added – in some situations actors cannot decide about conventions (Livet 1994).

2. Law from a Conventionalist Perspective

Without law, no modern economy would be possible. Property rights, trade law, liability law, trade mark law, patent law, labor law, contract law enable actors to produce, possess and exchange economic products and services. EC starts with this evidence.⁶ But EC questions law as a constraint for economic action. And the representatives of EC regard law as an incomplete institution. There are some main – and interrelated – arguments brought in by representatives of EC.⁷

2.1 Institutions (As Law) are Incomplete

First written law is seen as an incomplete dispositive for the coordination of economic actions. Here, EC can draw on Durkheim's argument of the social embeddedness of contracts and of social preconditions of the contract. Social order and social relations (social bonds) must be preexisting to make contracts possible – i.e. to rely on its fulfillment and the possibility of its enforcement: "The contract is not sufficient by itself, but is only possible because of the regulation of contracts, which is of social origin" (Durkheim 1984, 162). The conventionalist Bénédicte Reynaud has worked out in more detail the necessity of rules and contracts as institutional dispositives that have to be interpreted in situations (Reynaud 1987, 1988). Reynaud has criticized the concept of the firm as a system of labor contracts. For Reynaud, it is evident that this kind of contract cannot be reduced to a juridical rule because the fundamental uncertainty remains: the uncertainty about the quality of labor (Reynaud 1987, 1988). There is a time gap between the conclusion of the labor contract on the one hand, and the execution of the contract, which is the performance of the labor force in the firm on the other hand.⁸ Labor contracts are, in most cases, long-term agreements which cannot specify all the conditions and details in advance for the work to be done – unless the kind of labor is highly standardized and its amount can be calculated and guaranteed for the long-term perspective. Therefore, the labor contract *needs* to be incomplete! Christian Bessy and François Eymard-Duvernay (1995) also systematically studied economists' and law scientists' approaches for the analysis of labor relations in firms. Both argue that the firm can be conceived as a dispositive for the enduring economic coordination of actors. For Bessy and Eymard-Duvernay, this long-term character is not appropriately grasped by economic and legal concepts of the contract (Eymard-Duvernay 1988; Bessy and Eymard-Duvernay 1995). One rea-

⁶ For property rights see the contributions of Bessy and Brousseau (1998), Brousseau and Bessy (2006).

⁷ For a more detailed presentation see Diaz-Bone (forthcoming).

⁸ See also the model of the interrelation between labor and its product in Salais (2011, 231) which is also presented in Salais (2007, 102).

son for this is that conventions for the interpretation and for the practical management of the labor relations evolve over time between employers and employees. These conventions need not to be regulated in juridical terms or by labor law, because of the specifics of each situation and of each firm (Eymard-Duvernay 1988, 545). In a similar vein, Olivier Favereau (1989, 1997) has developed an argument which is not in line with the Durkheimian tradition. He does not explain the incompleteness of the contract by referring to its foregoing social embeddedness (which “completes” the contract). Favereau instead refers to the firm as learning organization. Contracts and rules are the result of collective learning and they are used to mobilize the collective intentionality for coordination and – in forms – for production. For this, Favereau conceives rules and contracts as collective cognitive devices, because they are used by competent actors for their coordination. Labor contracts generalize this willingness to cooperate in the collective coordination (Favereau 1989, 298). Organizational rules and contracts become objects and their incompleteness enables collective learning and they materialize collective learning processes. And, consequently, organizations are environments for these learning processes. Incompleteness of rules and contracts, for Olivier Favereau, is therefore “not the problem, but the solution” (Favereau 1989, 1997).

All these conventionalist contributions relate the incompleteness of (labor) contracts and (legal) rules to the uncertainty and the impossibility to specify all future situations in contracts. In principle, this is the perspective not only on contracts but on written law in general.⁹

2.2 Endogenizing Law

The next argument builds up on the first one: from the standpoint of EC institutions – as law – are not regarded as external constraints for individuals’ actions. Instead, institutions are regarded as “endogenous” to action. That means institutions are interpreted and enacted by actors in situations (Bessy 2002, 2011; Diaz-Bone 2009a; Salais 1998, 2007). This is the only kind of reality they possess and being mobilized by actors they are perceived to have “impact on their own.” And, of course, institutions as law are not totally flexible for *any* interpretation, but interpretation has to be applied to complete them and to put them into practice.

Meanwhile, there are two collections of EC published which present this pragmatic approach to the analysis of law and its institutions (see Favereau 2010; Bessy et al. 2011).

One has to note [...], that it is the legal rules itself, which require efforts for understanding and interpretation from the persons for whom the rules are made. To

⁹ It is necessary to be aware of the difference between institutions and conventions. See Salais (1998) and Diaz-Bone (2012).

the extent, in which legal statements have a general character, actors – who have to have to apply them – often have to determine which precise actions have to be exerted to be in accordance with these rules. They have to find out which practical meaning is to be given to legal rules in everyday life. Although the literal meaning of legal rules is hardly understandable, law always entails a part of incompleteness, imprecision and ambiguity (this to the extent in which law avoids to enumerate criteria or limits, which determine the legal or illegal character of a fact). [...] The majority of legal texts cannot be regarded as prescriptions for immediate executable actions. Instead, they offer principles and this is the reason why they need to be translated into the practical context. Therefore, actors conceive legal rules as something whose meaning can be negotiated. Because of a missing agreement about the meaning of the legal rule, the chance to achieve collective action is undermined. The tenor of this agreement about how to interpret these texts is necessarily influenced by actor's ideas, values and interest, who realized these agreements (Bessy et al. 2011, 17).¹⁰

This “mobilization” of institutions is done by relating them to a given constellation of conventions which are present as a plurality of possible logics of coordination. But the relation between law and collective action (and economic coordination) is more complex, because there is no one-way causality assumed in EC. As Claude Didry (2002) has shown, local collective agreements (in French *conventions collectives*) between workers and industrial entrepreneur in the Paris Region (in the 1930s) have induced debates between parliamentarian and lawyers. Afterwards, labor law was changed – the form of collective contracts was introduced into French labor law as a legal form (which was formerly not known in France with its liberal and individualistic law tradition on which the Civil Code is based). And the other way round: legislation and legal categories co-evolved with the emergence of social groups which were not pre-existing. Social actors had to make sense of new legal categories and legal forms. Robert Salais, Nicolas Baverez and Bénédicte Reynaud (1999) showed in their historical reconstruction of the social category of unemployment how new categories, new labor law and industrial labor organizations (which is the oppositional category to continuous work) co-emerged and actors had to adapt to this co-construction of this upcoming constellation of new forms of labor organization and legal categories. Claude Didry (2012, 2013) has coined the notion of “social questioning” to characterize the complex pragmatic relationship between legal forms and upcoming needs in new situations. French workers questioned the labor law of the *Code Civil* (including the labor contract between individuals, not collectives) and existing labor conventions as inappropriate to meet the new need of the coordination of new (historical) situations of emerging industrial labor relations. Existing rules, conventions and laws were made explicit and were put in question, so actors had to find solutions sometimes in conflicting situations as in lawsuits (Didry 2002, 2013, 2015 in

¹⁰ Translation by the author.

this HSR Special Issue). It is evident for EC that the analysis of law cannot be reduced to the internal analysis of its written juridical texts. The genuine pragmatic approach of EC focuses instead on (new) coordination problems and on what economic actors do with it in historical situations.

2.3 Investments in Forms

Related to the argument of the necessity to endogenize the analysis of law is the argument to include the analysis of investment in forms. Legal categories and categories that are included in processes of legislation have been an object of study for EC for decades – especially socio-professional categories (Salais et al 1999; Desrosières and Thévenot 2002; Judde and Hanne 2011; Amossé 2013). Eymard-Duvernay and Thévenot started in the early 1980s to apply the concept of investment in forms to theorize the socio-cognitive establishment of forms to which evaluation and coordination are related (Eymard-Duvernay and Thévenot 1983a, 1983b; Thévenot 1984). To achieve stabilized forms of (economic) coordination, actors also have to invest in this kind of socio-cognitive environments of “forms” and actors have to bring the relevant information into those forms (to “in-form”), which are different depending on the different conventions as logics of coordination.

Legal categories such as: “employer,” “employee,” “unemployed,” and many others are categories which are established not only as legal, juridical or legitimate, but as categories whose scope is enforced by law, which means by the State. Since the 1970s, Pierre Bourdieu and Luc Boltanski have pointed to the important role of law for the hedging and the back-up of professional categories (Bourdieu and Boltanski 1975). (Bourdieu and Boltanski do not belong to the scientific movement of EC, but they trained the founders of this approach and Boltanski cooperated closely with them.)

In the process of social coding, words have practical impacts (this is the *definition of law*). If, in the establishment of the definition of a profession, a word is lost, then there will be effects. For example, a certain unwanted task will not be fulfilled or, vice versa, one cannot perform certain tasks one wants to exert. [...] Because social terminology (names of classes, occupations etc.) is the object and the instrument in the symbolic fights between the classes for the definition of the social world – that means for the definition of social categories and therefore for social gradation and degradation – it belongs [...] to the sphere of *official terms*, i.e. to law (Bourdieu and Boltanski 1975, 107; emphasis in original).¹¹

As Bourdieu (2014) has argued, the final foundation for categories and law is the State itself. This institution definitively has the final symbolic power to establish and to enforce legal categories as social forms. But as conventional-

¹¹ Translation by the author.

ists have argued, there must be an underlying general principle to establish forms, which is a convention.¹² Alain Desrosières has labeled these conventions “conventions of equivalence”, which are principles that make possible to relate different forms and categories to each other and which enable actors to evaluate and construct “worth” to actors, objects, events and processes – this is the argument of Boltanski and Thévenot (2006).

The notion of ‘investments of form’ stresses the treatment of persons and things in forms or formats that help maintain them at a certain level of generality by establishing equivalences. In such cases, general characterizations, classifications, and standards are envisaged in material terms on the basis of costly operations that give form to persons and things and facilitate – for a price – subsequent coordinations that rely on these being in ‘in good form’. On the model of a productive investment, the actors expect to receive a benefit in exchange consisting in ease of coordination. Investments of form are differentiated according to the extension of the scope of validity, in time or space, of the establishment of equivalence, and also according to consistency of the material support by which the equivalence is sustained (Boltanski and Thévenot 2006, 359).

For Desrosières, the establishment of conventions of equivalence is the core resource for the nation building in France (Desrosières 2002). His analysis demonstrates how the scope of forms is extended to the geographic frontiers of France, thereby forming the unity of this nation, which Desrosières has called “adunation” (Desrosières 2002).¹³ The methodologically important aspect here is that, for EC, the methodological terms of levels for the explanation of social phenomena are marginal. Here, EC is positioned in contrast to methodological individualism or methodological holism (Diaz-Bone 2011). Instead, concepts as investment in forms can be applied to explain why economic coordination is not restricted to the moment and the situation of interacting individuals. For EC, coordination can have an enormous scope in space and time as Salais, Bave- rez and Reynaud demonstrated discovering the evolution of the form of unemployed and continuously employed industrial workers (Salais et al. 1999). In the case of this study, the scope reached round about hundred years in time and the whole French territory in space. Recently, Claude Didry worked out the concept of investment in forms and conceived law as a public investment in form.¹⁴ So, scope is EC’s alternative concept to the concept of levels.¹⁵

¹² See for the consideration of “state conventions” Salais and Storper (1997), Salais (2007, 2013), Didry (2002) and the contributions of Claude Didry (2015) and Frédéric Marty (2015) (in this HSR Special Issue).

¹³ See also the contributions in Affichard (1977, 1987).

¹⁴ See also Didry 2015, (in this HSR Special Issue).

¹⁵ In fact EC collapses these levels which are so important for other institutionalist approaches.

2.4 The Plurality of Law Professional Organizations

Forms do enlarge the scope of convention-based coordinations. There is another concept which was used to explain this enlargement. Christian Bessy has highlighted the role of lawyers who endogenize law in their tasks of counseling and representing their client. Bessy and other representatives of EC have analyzed lawyers and their firms as “law intermediaries” (*intermédiaires du droit*) who transmit logics of coordination and conventions.¹⁶ In an empirical study, different types of lawyers, their corresponding organizational forms and perceptions of qualities were identified by researchers of EC (Favereau 2010; Bessy 2010, 2012).¹⁷

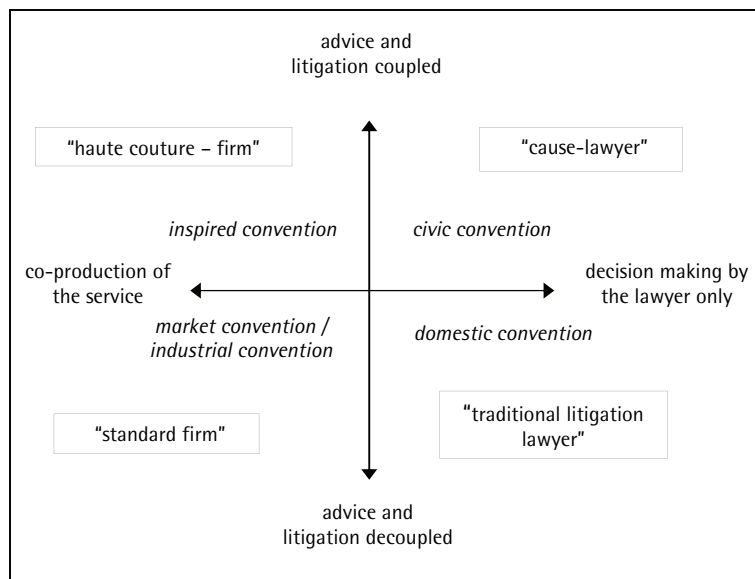
Indeed each case evokes a different perception of quality by the client: *inspired* quality (client’s expectations centered on creativity), *industrial* quality (client’s expectations based on efficiency), *market* (or merchant) quality (client’s expectations centered on obtaining the international standard at the best cost), *civic* quality (client’s expectations related to a certain vision of general interest expressed by lawyer), *domestic* quality (client’s expectations related to his confidence in the lawyer’s ability to handle his personal file completely) (Bessy 2012, 26-7; emphasis in original).

These four identified qualities correspond to specific organizational forms (Bessy 2012, 27). The traditional lawyer acts for clients (mostly private persons) in simple legal matters (“traditional litigation lawyer”). The cause lawyer deals with specific lawsuits for which he is regarded as expert. Both kinds of lawyers decide themselves how to proceed (“cause lawyer”). The other two organizational forms (“haute couture-firm” and “standard firm”) can be characterized by the cooperation between lawyers and their clients in the decision process how to conduct the lawsuit and how to develop a strategy for it. In many cases experts – who are not lawyers – are called in. Big companies which are specialized in juridical counseling (so-called law firms) entertain groups of lawyers and experts (they can realize both organizational forms). In figure 1 these different organizational forms are grouped according to two main oppositions and they are related to the four corresponding conventions.

¹⁶ See for further roles of intermediaries the contributions in Bessy et al., eds (2011) and Bessy (2015, in this HSR Special Issue).

¹⁷ Bessy has also studied the different convention-based forms of labor contracts (Bessy 2007) and different practices of dismissal (Bessy 1993). One can consider these also as mediating forms to enhance the scope of conventions. And these contracts are embedded in process of recruiting as EC has studied in detail (Eymard-Duvernay and Marchal 1997; Marchal and Rieucau 2010).

Figure 1: Quality Convention of Legal Services



Source: Bessy (2012, 30).

Regarding Figure 1, it can be concluded that there is no such thing like one simple market for juridical services. As other markets this market shows a plurality of quality conventions and a plurality of forms.

3. Discourse, Cognition and Law

Applying a complex pragmatic situationalism as a methodological position also leads to the inclusion of cognitive structures and reference points (in French *repères*) which have an influence on the coordination. Very early, it was Laurent Thévenot, who extended EC's research agenda to the analysis of law-related coordination of actors (Thévenot 1992). For Thévenot, legal judgments and "juridical statements" are justifications which can be related to investment in forms and to orders of justification. Boltanski and Thévenot identified six of them in "On justification" (Boltanski and Thévenot 2006).

For Thévenot a "juridical statement" is not a speech act (Austin 1975) in the sphere of judiciary. Instead, it can be conceived as an action, which claims for a general scope, relying on the adequate forms for this claim which allow this scope (Thévenot 1992).

Juridical forms and equivalences allow for unrestricted scope of juridical judgments so they overarch situation (in court) in time and space, which is an

important difference to Austin's concept of speech acts. Law therefore can be understood as an investment in form with highest validity and stability (Thévenot 1992, 1286). But juridical statements – as everyday speech acts – have to be built up on *qualification processes* of persons, objects, events, actions. In the theoretical context of EC, the term of qualification has a specific meaning: to attribute worth (Storper and Salais 1997; Boltanski and Thévenot 2006). Afterwards, it is possible for concepts as “facts of a case” to enter into the juridical discourse.

The judge has to *qualify* the factual situation, i.e. to select and format the relevant (from *relevare*: raise up) evidence to state that a certain regulation applies. Similarly, human and non-human entities have to qualify for a conventional order of worth for their being involved in this convention of coordination which is thus a convention of quality. This is the way EC's realistic approach to coordination is based on the shaping of the material environment, and not limited to values or argued discourse (Thévenot 2012, 5; emphasis in original).

Juridical processes which “apply” law can be understood as interpretative processes which have to generate a generalizable situation in which a coherence of its relevant elements is realized. The coherence is structured by a compromise of a plurality of conventions – relevant objects, events and qualifications reflect this compromise. Thereby a collective cognition of the ethical justness (*justice*) and formal correctness (*justesse*) of the ongoing process and the generated juridical judgments can be the outcome.¹⁸ Collective cognition is a process which is “distributed,” this distributed cognition is not realized in an individual mind but is accomplished in the situation (and its continuations) itself.¹⁹

3.1 EC and Discourse

The analysis presented in “On justification” can also be seen as a kind of pragmatic discourse analysis. But both authors have insisted on the important role of objects and cognitive forms – both are of a substance and reality which is non-discursive. The consequence is that orders of justification (and conventions) cannot be reduced to discourse and to a discursive reality. For EC, this is evident.

What is not evident for EC is the relation of conventions on the one side and discourses, discursive orders and discursive structures as cognitive structures on the other side.²⁰ This is astonishing because of the presence of the works of Michel Foucault in France, who introduced a strong notion of discourse prac-

¹⁸ From a conventionalist perspective this similarity (assonance) between the French words “justice” and “justesse” is not an accidental one. The contributions in Boltanski and Thévenot (1989) present (empirical) examples how the normative foundations of coordination have two sides at once: an ethical side and a “technical” side. Both have a practical dimension.

¹⁹ EC has adopted the concept of distributed cognition from Edwin Hutchins (1995).

²⁰ One exception has to be mentioned. Pierre-Yves Gomez (1994, 1996) combined EC with Michel Foucault's notions of discourse and dispositive. But Gomez developed his own notion of convention and is (still) not well-recognized or discussed by other representatives of EC.

tice and who related it also to non-discursive practices, thereby combining structuralism and pragmatism as EC does (Foucault 1970, 1972).²¹

Only some years ago, François Eymard-Duvernay referred to the necessary role of language as basis for calculative practices. He introduced the concept of discursive practices into the analysis of economic (calculative) procedures. For Eymard-Duvernay, the establishment of conventions is grounded on language use (Eymard-Duvernay 2009). There are some more works which rely on EC and regard language use and discursive practices as fundamental for the social construction of economic worth, economic categories and economic coordination (Diaz-Bone 2009c, 2013; Judde de Larivière and Hanne 2011; Mützel 2009, 2013).²²

One could add here the work of David Stark (2009). He combined the approach of a plurality of orders of worth (Boltanski and Thévenot 2006) with his concept of heterarchy (as coexistence of multiple evaluative principles) to analyze complex processes of (re)organization (Stark 2009, xvii). Stark brings in the notion of a “discursive pragmatism”.

Success requires attention to the structure of temporal processes. I refer to a collective sense of rhythm and timing – of when to make temporary settlements to get the job done, with the knowledge that this is not a once-and-for-all resolution of the disagreements – as a *discursive pragmatism*. Heterarchy is neither harmony nor cacophony but an organized dissonance (Stark 2009, 27; emphasis in original).

Stark stresses the role of discursive practices for coordination and for the mobilization of a “collective intentionality” (Searle) to realize coordination under conditions of heterarchy.

Studying unemployment, Emmanuelle Marchal, Delphine Remillon and François Eymard-Duvernay analyzed unemployed persons in different labor worlds by applying lexicometric and discourse analytic tools (Marchal and Remillon 2012; Eymard-Duvernay and Remillon 2012). All of these recent works have identified deep structures in discourses which can be regarded as conventions (or as orders of justification). So one main concept – conventions as logics of coordination in situations – has another form of appearance: it is like a watermark in discourses, that is a deeper structure in collective knowledge. Conceived in this way, conventions can be regarded as socio-cognitive structures in discursive orders where they have a durable existence – overarching situations in time and space.

²¹ See the contributions in *Historical Social Research* 33 (1), “Discourse Analysis in the Social Sciences” (Bührmann et al. 2008). Foucault’s theory and his contribution to sociology of law have been discussed by scholars of law sciences. See Golder and Fitzpatrick (2009, 2010), Ewald (1990), Turkel (1990), Hunt (1992), Tadros (1998) and Valverde (2010).

²² See also the contribution from Robert Salais (2015) on language use in neoliberalism in this HSR Special Issue. See Favereau (2013) for the interpretation of economics as language use.

3.2 Worlds of Law

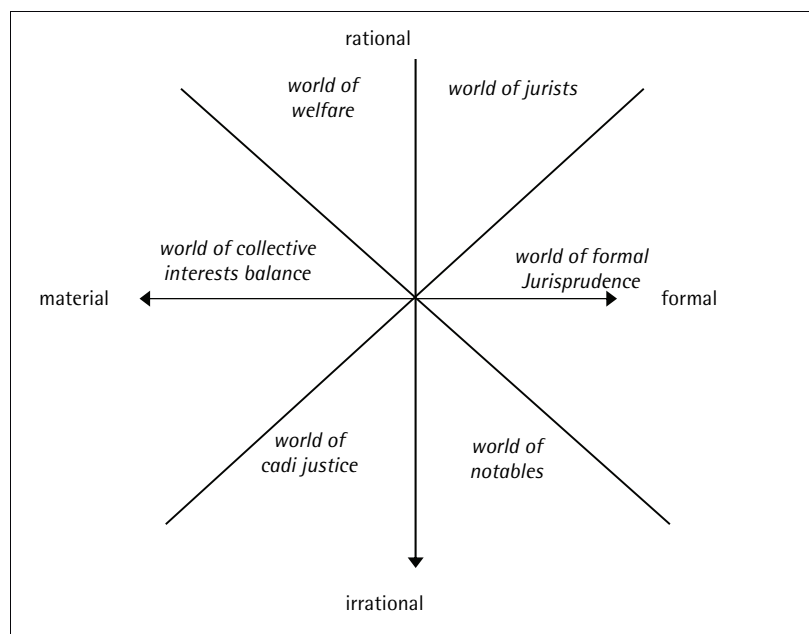
Claude Didry has worked out a pragmatist sociology of law which includes classical positions of Max Weber and Emile Durkheim. The study “Naissance de la convention collective” (Didry 2002) represents an innovative contribution of EC to an “economic sociology of law” (Swedberg 2002, 2003; Ford and Swedberg 2009). Didry applies considerations from the field of sociology of law to the pragmatic analysis of economic law. Didry goes beyond the classical positions and his work can be regarded as the most advanced form of discourse analysis of law processes and of worlds of law. He introduces the concept of “production of law” and he speaks of “juridical work” (Didry 2002, 14, 27). This work is done by a multiplicity of actors at different stages of juridical practice. Different actors (persons, groups, and organizations) are involved in the processes of pre-wording, negotiations and elaboration of laws. These different actors induce a plurality of discursive positions and “registers of argumentation” (Didry 2002, 124). From Didry’s perspective, jurisprudence (as science of law) neglects this engagement of different actors in the production of law and law interpretation. Also, in jurisprudence, it is neglected that there is a difference between the “legislative body” and the “factual social reality.” The State is a *producer* of juridical norms and law itself can be understood as the *presence* of the State in the sphere of economic actions (Didry 2002, 32). But for Didry, the State is not a coherent system and cannot be attributed to the idea of State as a system of norms as it is done in the tradition of law positivism of Hans Kelsen (1960). Instead, state-run commissions and nongovernmental commissions, employers’ associations, unions, law scientists, social movements, NGOs and private companies are involved in the complex process of designing, enacting and implementing laws. For Didry, it is of interest how law is produced in detail, what is its practical meaning that is situated in historical and pluralistic constellation of worlds of law. *Worlds of law* are built up out of conceptions how to interpret institutions of law and out of practices how lawsuits are processed (Didry 2002, 32). Worlds of law can be conceived – like orders of justification (Boltanski and Thévenot 2006) or worlds of production (Storper and Salais 1997) – as possible “cultural logics,” as “law cultures” which work as the foundation of how judges, lawyers, law scientists (“law professors”) understand their way of acting and how they can legitimate it. Worlds of law are used by actors to criticize other law worlds. Institutions of law can only exist, when they are able to repel criticism coming from other possible worlds of law and able to generate compromises between worlds of law (Didry 2002, 38).

Didry identified two main oppositions by which six possible worlds of law can be systematized.²³ The first one represents the degree of formalization of

²³ Didry’s identification of worlds of law is inspired by Michael Storper’s and Robert Salais’ concept of worlds of production and his methodology is influenced by their way to identify

law. This dimension reflects the intensity which is drawn on forms by the practice of law and separates itself from ethical aspects. The practice of law can be characterized as “formal” if it refers to forms of law. It is “material” if it refers to social norms. The second dimension catches the amount of rationalization of law. This is the degree of logical-deductive systematization and codification of law. The second dimension represents the juridical treatment of an individual case can be “deduced” out of general laws – this practice could be called “rational.” One could call a practice of law “irrational” if jurisdiction is based on specific lawsuits and related to specific situations. Figure 2 positions the worlds of law in a two-dimensional space.

Figure 2: Possible Worlds of Law



Source: Didry (2002, 39), Didry (2013, 68).

Didry scrutinized the different registers of arguments and different discourses in these six worlds. He could track different strategies of law production and law interpretation applying his concept of worlds of law. In all six worlds of

them (Storper and Salais 1997). One could characterize his worlds of law as ideal types in the sense of Max Weber's methodology.

law the concept of law, the relevant actors, the dominant principles and its procedures differs.²⁴

4. Conclusion

The French approach of economics of conventions (EC) has contributed a huge amount of research to the analysis of economic law. This research on law is integrated in the broader institutionalist perspective of EC. There are two innovative aspects which were discussed in this article. (1) Because EC differentiates between institutions (as law) and the pragmatic, collective logics of their usages (as conventions and orders of justification) EC focusses in an innovative way on actors' strategies how law is conceived, worded, implemented, interpreted and enacted. Law as an institution, therefore, is understood as endogenous to collective action and coordination. And the pragmatics of "law in action" is situated by EC into situations which are structured by actors' competences and a plurality of conventions actors have to handle and can refer to. EC's strategy of endogenizing law into such a plurality represents a pragmatic model of a "legal pluralism".²⁵ (2) EC offers new perspectives for a pragmatic form of discourse analysis that integrates discursive practices into the analysis of economic law, its production, application and meaning. The article has argued (thereby referring to the work of Didry) that EC has found a way to avoid the purely internal analysis of law which is the "discourse analysis" of written texts. Instead EC studies legal discourses as ongoing social practices in the legal production. EC also avoids a purely external analysis of law which would ignore the (although incomplete) content and form of law itself. But still the notion of discourse and the discourse analytic perspective within EC can and should be more developed as it is so far.

References

- Affichard, Joëlle, ed. 1977. *Pour une histoire de la statistique. Vol. 1: Contributions*. Paris: INSEE-Economica.
- Affichard, Joëlle, ed. 1987. *Pour une histoire de la statistique. Vol. 2: Matériaux*. Paris: INSEE-Economica.

²⁴ For more details about the empirical objects under study see Didry (2002) and Diaz-Bone (forthcoming).

²⁵ Here, one can discover affinities between EC's theoretical and methodological positions on the one side and classical positions of legal realism as the "law in action"-approach (Macaulay) or "legal pluralism" (Georges Gurvitch) on the other side.

- Amossé, Thomas. 2013. La nomenclature socio-professionnelle: une histoire revisitée. *Annales* 68 (4): 1039-75.
- Austin, John L. 1975. *How to do things with words*, 2nd ed. Cambridge: Harvard University Press.
- Bessy, Christian. 1993. *Les licenciements économiques. Entre la loi et le marché*. Paris: CNRS.
- Bessy, Christian. 2002. Institutional embeddedness of economic exchange: Convergence between new institutional economics and the economics of conventions. In *Conventions and structures in economic organization. Markets, networks, hierarchies*, ed. Olivier Favereau and Emmanuel Lazega, 79-92. Cheltenham: Edward Elgar.
- Bessy, Christian. 2007. *La contractualisation de la relation de travail*. Paris: LGDJ.
- Bessy, Christian. 2010. Les enjeux de la qualité: innovations juridiques et diversité des exercices professionnels. In *Les avocats, entre ordre professionnel et ordre marchand*, ed. Olivier Favereau, 13-6 (Synthese 3) and 83-110 (Analyse 3). Paris: Lextenso editions/Gazette du Paris.
- Bessy, Christian. 2011. Repräsentation, Konvention und Institution. Orientierungspunkte für die Économie des conventions. In *Soziologie der Konventionen. Grundlagen einer pragmatischen Anthropologie*, ed. Rainer Diaz-Bone, 167-202. Frankfurt: Campus.
- Bessy, Christian. 2012. Law, forms of organization and the market for legal services. *Economic Sociology – European Electronic Newsletter* 14 (1): 20-9 <http://econ.soc.mpifg.de/archive/econ_soc_14-1.pdf>.
- Bessy, Christian. 2015. The Dynamics of Law and Conventions. *Historical Social Research* 40 (1): 62-77. doi: 10.12759/hsr.40.2015.1.62-77.
- Bessy, Christian, and Eric Brousseau. 1998. Technology licensing contracts features and diversity. *International Review of Law and Economics* 18: 451-89.
- Bessy, Christian, Thierry Delpeuch, and Jérôme Pélisse. 2011. Situer la droit par rapport à l'action économique. Les apports croisés de l'économie institutionnaliste et de la sociologie du droit. In *Droit et régulations des activités économiques et institutionnalistes*, ed. Christian Bessy, Thierry Delpeuch and Jérôme Pélisse, 9-29. Paris: LGDJ.
- Bessy, Christian, Thierry Delpeuch, and Jérôme Pélisse, eds. 2011. *Droit et régulations des activités économiques et institutionnalistes*. Paris: LGDJ.
- Bessy, Christian, and François Eymard-Duvernay. 1995. Les économistes et les juristes face à la relation de travail dans l'entreprise. *Revue d'économie politique* 105 (6): 937-64.
- Boltanski, Luc, and Laurent Thévenot. 2006. *On justification. Economies of worth*. Princeton: Princeton University Press.
- Boltanski, Luc, and Laurent Thévenot, eds. 1989. Justesse et justice dans le travail. *Cahiers du Centre d'études de l'emploi* 33. Paris: PUF.
- Bourdieu, Pierre. 1987. The force of law: Towards a sociology of the juridical field. *Hastings Law Journal* 38: 314-853.
- Bourdieu, Pierre. 2014. *On the State. Lectures at the Collège de France 1989-1992*. New York: Wiley.
- Bourdieu, Pierre, and Luc Boltanski. 1975. Le titre et le poste: rapports entre le système de production et le système de reproduction. *Actes de la recherche en sciences sociales* 1 (2): 95-107.

- Brousseau, Eric, and Christian Bessy. 2006. Public and private institutions in the governance of intellectual property rights. In *Intellectual property rights innovation, governance and the institutional environment*, ed. Brigitte Andersen, 243-77. Cheltenham: Edward Elgar.
- Bührmann, Andrea, Rainer Diaz-Bone, Encarnacion Gutierrez-Rodriguez, Gavin Kendall, Werner Schneider, and Francisco Tirado, eds. 2008. Discourse analysis in the social sciences. *Historical Social Research* Special Issue 33 (1) <<http://www.gesis.org/hsr/archiv/2008/331-discourse-analysis>>.
- Desrosières, Alain. 2002. *The politics of large numbers*. Cambridge: Harvard University Press.
- Desrosières, Alain, and Laurent Thévenot. 2002. *Les catégories socioprofessionnelles*, 5th ed. Paris: La Découverte.
- Diaz-Bone, Rainer. 2009a. Konvention, Organisation und Institution. Der institutionentheoretische Beitrag der "Économie des conventions." *Historical Social Research* 34 (2): 235-64 <<http://www.ssoar.info/ssoar/handle/document/28681>>.
- Diaz-Bone, Rainer. 2009b. Économie des conventions. In *Wirtschaftssoziologie. Kölner Zeitschrift für Soziologie und Sozialpsychologie*, Sonderheft 49, ed. Jens Beckert and Christoph Deutschmann, 179-93. Wiesbaden: VS-Verlag.
- Diaz-Bone, Rainer. 2009c. Qualitätskonventionen als Diskursordnungen in Märkten. In *Diskurs und Ökonomie. Diskursanalytische Perspektiven auf Märkte und Organisationen*, ed. Rainer Diaz-Bone and Gertraude Krell, 267-92. Wiesbaden: VS-Verlag.
- Diaz-Bone, Rainer. 2011. The methodological standpoint of the "économie des conventions". *Historical Social Research* 36 (4): 43-63 <<http://www.gesis.org/hsr/archiv/2011/364-conventions-institutions>>.
- Diaz-Bone, Rainer. 2012. Elaborating the conceptual difference between conventions and institutions. *Historical Social Research* 37 (4): 64-75 <<http://www.ssoar.info/ssoar/handle/document/38408>>.
- Diaz-Bone, Rainer. 2013. Discourse conventions in the construction of wine qualities in the wine market. *Economic Sociology – European Electronic Newsletter* 14 (2): 46-53 <http://econsoc.mpifg.de/archive/econ_soc_14-2.pdf>.
- Diaz-Bone, Rainer. Forthcoming. *Die Économie des conventions*. Wiesbaden: VS-Verlag.
- Diaz-Bone, Rainer, and Robert Salais, eds. 2011. Conventions and institutions from a historical perspective. *Historical Social Research* Special Issue 36 (4) <<http://www.gesis.org/en/hsr/archive/2011/364-conventions-institutions>>.
- Diaz-Bone, Rainer, and Robert Salais, eds. 2012. The Économie des Conventions – Transdisciplinary discussions and perspectives. *Historical Social Research* Focus 37 (4) <<http://www.gesis.org/en/hsr/archive/2012/374-the-economie-des-conventions>>.
- Diaz-Bone, Rainer, and Laurent Thévenot. 2010. Die Soziologie der Konventionen. Die Theorie der Konventionen als ein zentraler Bestandteil der neuen französischen Sozialwissenschaften. *Trivium* 5 <<http://trivium.revues.org/index3557.html>>.
- Diaz-Bone, Rainer, and Laurent Thévenot, eds. 2010. Sociologie des conventions/Soziologie der Konventionen. *Trivium* 5. Paris: Éditions de la maison des sciences de l'homme <<http://trivium.revues.org/index3540.html>>.
- Diaz-Bone, Rainer, ed. 2011. *Soziologie der Konventionen. Grundlagen einer pragmatischen Anthropologie*. Frankfurt: Campus.

- Didry, Claude. 2002. *Naissance de la convention collective. Débats juridiques et luttes sociales en France au début du XXe siècle*. Paris: EHESS.
- Didry, Claude. 2012. Labour law as social questioning: The contribution of the “labour conventions approach” to a different history of socio-economic institutions. *Economic Sociology – European Electronic Newsletter* 14 (1): 11-9 <http://econsoc.mpifg.de/archive/econ_soc_14-1.pdf>.
- Didry, Claude. 2013. Contributing to a pragmatic institutionalism of economic law – Claude Didry interviewed by Rainer Diaz-Bone. *Economic Sociology – European Electronic Newsletter* 14 (2): 61-8 <http://econsoc.mpifg.de/archive/econ_soc_14-2.pdf>.
- Didry, Claude. 2015. The Institutional Foundations of “Labour Conventions” in France between the Wars. *Historical Social Research* 40 (1): 42-61. doi: 10.12759/hsr.40.2015.1.42-61.
- Durkheim, Emile. 1984. *The division of labor in society*. New York: Free Press.
- Ewald, François. 1990. Norms, discipline, and the law. *Representations* 30: 138-61.
- Eymard-Duvernay, François. 1988. Le lien durable d’emploi: des accommodements difficiles avec le marché. *Droit social* 7-8: 544-7.
- Eymard-Duvernay, François, and Laurent Thévenot. 1983a. *Investissements spécifiques et concurrence sur le marché*. Paris: INSEE.
- Eymard-Duvernay, François, and Laurent Thévenot. 1983b. *Les investissements de forme. Leur usage pour la main d’œuvre*. Paris: INSEE.
- Eymard-Duvernay, François. 2009. L’économie des conventions entre économie et sociologie: l’homo conventionalis calcule et parle. In *Traité de sociologie économique*, ed. Philippe Steiner and François Vatin, 131-64. Paris: PUF.
- Eymard-Duvernay, François, and Emmanuelle Marchal. 1997. *Façons de recruter. Le jugement des compétences sur le marché du travail*. Paris: Métailié.
- Eymard-Duvernay, François, and Delphine Remillon. 2012. Généalogies du chômage: les biographies professionnelles comme parcours d’épreuves. In *Epreuve d’évaluation et chômage*, ed. François Eymard-Duvernay, 107-57. Toulouse: Octares.
- Eymard-Duvernay, François, ed. 2006a. *L’économie des conventions. Méthodes et résultats. Vol. 1: Débats*. Paris: La Découverte.
- Eymard-Duvernay, François, ed. 2006b. *L’économie des conventions. Méthodes et résultats. Vol. 2: Développements*. Paris: La Découverte.
- Eymard-Duvernay, François, ed. 2012. *Epreuves d’évaluation et chômage*. Toulouse: Octarès Editions.
- Favereau, Olivier. 1989. Marchés internes, marchés externes. *Revue économique* 40 (2): 273-328.
- Favereau, Olivier. 1997. L’incomplétude n’est pas le problème, c’est la solution. In *Les limites de la rationalité. Vol. 2: Les figures du collectif*, ed. Bénédicte Reynaud, 219-33. Paris: La Découverte.
- Favereau, Olivier. 2013. Keynes after the economics of conventions. *Evolutionary Institutional Economics Review* 10 (2): 179-95.
- Favereau, Olivier, ed. 2010. *Les avocats, entre ordre professionnel et ordre marchand*. Paris: Lextenso Editions/Gazette du Paris.
- Favereau, Olivier, and Emmanuel Lazega, eds. 2002. *Conventions and structures in economic organization. Markets, networks, hierarchies*. Cheltenham: Edward Elgar.

- Ford, Laura and Richard Swedberg. 2009. Law in economy and society: Introductory comments. *Economic Sociology – Electronic European Newsletter* 10 (3): 3-7 <http://econsoc.mpifg.de/archive/econ_soc_10-3.pdf>.
- Foucault, Michel. 1970. *The order of things*. New York: Random House.
- Foucault, Michel. 1972. *The archeology of knowledge*. New York: Random House.
- Golder, Ben, and Peter Fitzpatrick. 2009. *Foucault's law*. New York: Routledge.
- Golder, Ben, and Peter Fitzpatrick, eds. 2010. *Foucault and law*. London: Ashgate.
- Gomez, Pierre-Yves. 1994. *Qualité et théorie des conventions*. Paris: Economica.
- Gomez, Pierre-Yves. 1996. *Le Gouvernement de l'entreprise. Modèles économiques de l'entreprise et pratiques de gestion*. Paris: InterEditions.
- Hutchins, Edwin. 1995. *Cognition in the wild*. Cambridge: MIT Press.
- Hunt, Alan. 1992. Foucault's expulsion of law: Toward a retrieval. *Law & Social Inquiry* 17 (1): 1-38.
- Judde de Larivière, Claire, and Georges Hanne. 2011. Occupational naming conventions: Historicity, actors, interactions. *Historical Social Research* 36 (4): 82-102.
- Kelsen, Hans. 1960. *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, 2nd ed. Wien: Deuticke.
- Livet, Pierre. 1994. *La communauté virtuelle. Action et communication*. Paris: Editions de l'Eclat.
- Lyon-Caen, Antoine, and Joëlle Affichard, eds. 2008. *L'évaluation du droit du travail: Problèmes et méthodes. Rapport final. Vol. I. Rapport de synthèse*. Paris: IIPC <http://iipcc.eu/site/sites/default/files/evaluationdw_vol1_1.pdf>.
- Marchal, Emmanuelle, and Delphine Remillon. 2012. La recherche d'emploi façonnée par la pluralité des modes de valorisation du travail. In *Epreuve d'évaluation et chômage*, ed. François Eymard-Duvernay, 79-105. Toulouse: Octares.
- Marchal, Emmanuelle, and Géraldine Rieucan. 2010. *Le recrutement*. Paris: La Découverte.
- Marty, Frédéric. 2015. Towards an Economics of Convention-Based Approach of the European Competition Policy. *Historical Social Research* 40 (1): 94-111. doi: 10.12759/hsr.40.2015.1.94-111.
- Mützel, Sophie. 2009. Geschichten als Signale. Zur diskursiven Konstruktion von Märkten. In *Diskurs und Ökonomie. Diskursanalytische Perspektiven auf Märkte und Organisationen. Interdisziplinäre Diskursforschung*, ed. Rainer Diaz-Bone and Gertraude Krell, 225-44. Wiesbaden: VS-Verlag.
- Mützel, Sophie. 2013. On coordination, stories and meaning making in markets. In: *Economic Sociology – European Electronic Newsletter* 14 (2): 4-9 <http://econsoc.mpifg.de/archive/econ_soc_14-2.pdf>.
- Orléan, André, ed. 2004. *Analyse économique des conventions*, 2nd ed. (Édition quadruple). Paris: PUF.
- Reynaud, Bénédicte. 1987. Les règles, et l'incomplétude du contrat du travail. *IEPE document de travail* 8704 <http://www.idhe.cnrs.fr/IMG/pdf/No_8704_Les_regles_et_l_incomplétude_du_contrat_de_travail.pdf>.
- Reynaud, Bénédicte. 1988. Le contrat de travail dans le paradigme standard. *Revue française d'économie* 3 (4): 157-94.
- Reynaud, Bénédicte. 2004. *Les règles économiques et leurs usages*. Paris: Odile Jacob.
- Salais, Robert. 1998. A la recherche du fondement conventionnel des institutions. In *Institutions et conventions. La réflexivité de l'action économique (Raisons pra-*

- tiques 9), ed. Robert Salais, Élisabeth Chatel and Dorothée Rivaud-Danset, 255-91. Paris: EHESS.
- Salais, Robert. 2007. Die "Ökonomie der Konventionen". Eine Einführung mit Anwendung auf die Arbeitswelt. In *Märkte als soziale Strukturen*, ed. Jens Beckert, Rainer Diaz-Bone and Heiner Ganßmann, 95-112. Frankfurt: Campus.
- Salais, Robert. 2011. Labour-related conventions and configurations of meaning: France, Germany and Great Britain prior to the Second World War. *Historical Social Research* 36 (4): 218-47 ><http://www.ssoar.info/ssoar/handle/document/36304>>.
- Salais, Robert. 2013. *Le viol de l'Europe. Enquête sur la disparition d'une idée*. Paris: PUF.
- Salais, Robert. 2015. Europe, Laboratory for A-Democracy? *Historical Social Research* 40 (1): 185-99. doi: 10.12759/hsr.40.2015.1.185-199.
- Salais, Robert, Nicolas Baverez, and Bénédicte Reynaud. 1999. *L'invention du chômage. Histoire et transformations d'une catégorie en France des années 1890 aux années 1980*, 2nd ed. Paris: PUF.
- Salais, Robert, Élisabeth Chatel, and Dorothée Rivaud-Danset, eds. 1998. *Institutions et conventions. La réflexivité de l'action économique (Raisons pratiques 9)*. Paris: EHESS.
- Salais, Robert, and Laurent Thévenot, eds. 1986. *Le travail. Marchés, règles, conventions*. Paris: Economica.
- Stark, David. 2009. *The sense of dissonance*. Princeton: Princeton University Press.
- Storper, Michael, and Robert Salais. 1997. *Worlds of production. The action frameworks of the economy*. Cambridge: Harvard University Press.
- Swedberg, Richard. 2002. Law and economy. The need for a sociological approach. *Economic Sociology – European Electronic Newsletter* 3 (3): 47-52 <<http://econsoc.mpifg.de/archive/esjune02.pdf>>.
- Swedberg, Richard. 2003. The case for an economic sociology of law. *Theory and Society* 32 (1): 1-37.
- Tadros, Victor. 1998. Between governance and discipline: The law and Michel Foucault. *Oxford Journal of Legal Studies* 18 (1): 75-103.
- Thévenot, Laurent. 1984. Rules and implements: Investments in forms. *Social Science Information* 23 (1): 1-45.
- Thévenot, Laurent. 1992. Jugements ordinaires et jugement du droit. *Annales* 47 (6): 1279-99.
- Thévenot, Laurent. 2006. *L'action au pluriel. Sociologie des régimes d'engagement*. Paris: La Découverte.
- Thévenot, Laurent. 2007. The plurality of cognitive formats and engagements moving between the familiar and the public. *European Journal of Social Theory* 10 (3): 409-23.
- Thévenot, Laurent. 2012. Law, economies and economics: New critical perspectives on normative and evaluative devices. *Economic Sociology – European Electronic Newsletter* 14 (1): 4-10 <http://econsoc.mpifg.de/archive/econ_soc_14-1.pdf>.
- Turkel, Gerald. 1990. Michel Foucault: Law, power, and knowledge. *Journal of Law and Society* 17 (2): 170-93.
- Valverde, Mariana. 2010. Specters of Foucault in law and society scholarship. *Annual Review of Law and Social Science* 6: 45-59.
- Weber, Max. 1985. *Wirtschaft und Gesellschaft*, 5th ed. Tübingen: J. C. B. Mohr.